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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No. 78-1940

JAMES E. O'CONNOR, et al.,
Appellants,

vs.

SAN FRANCISCO POLICE COMMISSION, et al.,
Appellees.

On Appeal from the California Court of Appeal First Appellate District

APPELLANTS' REPLY TO MOTION TO DISMISS OR AFFIRM

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San Francisco argues that "there can be no expectation in the continuance of a statutory regulation scheme." Motion to Dismiss at 4-5. That identical argument was made and rejected in *Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95 (1938). In that case, a teacher with life tenure under a state statute was dismissed after the tenure law was repealed. The school authorities "urge[d] that every contract is subject to the police power and that in repealing the Teachers' Tenure Act the legislature validly exercised that reserved power of the state." *Id.* at 107. The Court disagreed. Noting that under the tenure statute teachers could be dismissed on a variety of expressly stated grounds or for any other "good and just cause," the Court did not hesitate to hold that a contract was impaired by

the State's action and, indeed, held that even after a weighing of interests that action could not be sustained:

> "Our decisions recognize that every contract is made subject to the implied condition that its fulfillment may be frustrated by a proper exercise of the police power but we have repeatedly said that, in order to have this effect, the exercise of the power must be for an end which is in fact public and the means adopted must be reasonably adapted to that end . . . . The causes of cancellation provided in the Act of 1927 . . . are persuasive that the repeal of the [tenure statute] was not an exercise of the police power for the attainment of ends to which its exercise may properly be directed." (*Id.* at 108-09).

Legislatures therefore do not have the unfettered right to impair "contract" rights created by statute by the simple expedient of repealing the statute. *See also United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977) (repeal of statutory covenant impaired obligations of contract)[1]; Jur. Statement at 10-11 n. 10 and cases cited.

The other basis for Appellees' motion to dismiss is this assertion:

> "The well settled rule of California law is that a certificate of public necessity and convenience, and other permits or licenses granted pursuant to the police power, do not create vested rights and are not contracts." (Motion to Dismiss or Affirm at 5).

[1] In *United States Trust*, the Court said:

> "In general, a statute is itself treated as a contract when the language and circumstances evince a legislative intent to create private rights of a contractural nature enforceable against the State." (431 U.S. at 17 n. 14).

San Francisco does not deny that prior to Proposition K, a permit holder had the right "enforceable against the state" to transfer the permit and to hold it free of revocation except for proven cause.

If San Francisco means to say only that the California courts view San Francisco's taxicab permits as not entitled to Contract Clause or Due Process protection, we agree; that is why we are here. But that is nothing more than a view of the ultimate federal questions which this Court is asked to decide. Federal constitutional rights under the Contract and Due Process Clauses do indeed turn on the underlying "rules or understandings" as established by state law[2], but federal rights surely are neither created nor destroyed by the labels the state chooses to use. San Francisco does not escape the modest strictures of the Constitution by a conclusory declaration, by itself or by the courts of California, that taxicab permits are neither "contracts" nor "property." *See Coombs* v. *Getz*, 285 U.S. 434, 441 (1932).

Happily, the federal questions in this case are not blurred by uncertainties over the incidents of the taxicab permits prior to the passage of Proposition K or over any aspect of California or municipal law. San Francisco does not argue that the California courts have rendered an interpretation of *state or local* law which defines the rights of permit holders in such a way as to exclude them from the protection of the Contract and Due Process Clauses. No questions of interpretation are presented. The state and local law characteristics of Appellants' taxicab permits are undisputed.

San Francisco made a formal commitment, expressed in its ordinances, to the holders of taxicab permits. San Francisco has never denied that, prior to Proposition K, taxicab permits

[2]

> "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."

Board of Regents v. *Roth*, 408 U.S. 564, 577 (1972); *see also Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1, 9 (1978); *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95-100 (1938).

were freely transferable and irrevocable except for proven cause. Its Police Code unambiguously provided that permits would be *irrevocable* except for proven cause and *transferable* to qualified transferees. §§ 1079, 1130. It did not hedge that commitment by warning that the ordinances conferring irrevocability and transferability might be revoked at any moment. No California court has ever held otherwise or even suggested that the Police Code did not mean what it said. *Compare Bishop* v. *Wood*, 426 U.S. 341, 344-46 (1976).[3]

The following observations of Professor Tribe are therefore entirely to the point:

> "[A]s Justice Story's concurring opinion in *Dartmouth College* had warned, the states remained free to reserve in their contracts and even in their constitutions the power to change their minds. Legislatures were therefore liberated to be as openly unreliable as they pleased in their dealings with the people.

[3] The statements in the text above are quickly confirmed by an examination of the California cases cited by San Francisco. The only cases having anything to do with taxicab permits or the applicable provisions of the Police Code are *Luxor Cab Co.* v. *Cahill*, 21 Cal. App. 3d 551, 98 Cal. Rptr. 576 (1971) and *People* v. *Galena*, 24 Cal. App. 2d 770, 70 P. 2d 724 (1937). Those cases are wholly irrelevant. *Luxor* involved a challenge by holders of taxicab permits to the issuance by San Francisco of additional permits. The court held that no vested rights of existing holders were infringed by the issuance of additional permits. It quoted the relevant provisions of the Police Code, pursuant to which the challengers' permits had been issued, which expressly authorized the issuance of additional permits under certain circumstances. Obviously, there had been no promise—contractual or otherwise—to issue no additional permits. *People* v. *Galena*, *supra*, merely upheld San Francisco's right to establish exclusive taxicab stands (*See City of New Orleans* v. *Dukes*, 427 U.S. 297 (1976)); as in *Luxor* (and unlike this case), there had been no prior contractual promise to the contrary. Nothing in either case purported to interpret the sections of the Police Code at issue here or to discuss the Code's promise that permits would be irrevocable and transferable; indeed, those cases had nothing whatever to do with the issues of irrevocability or transferability of permits.

> "The catch is that, for a variety of reasons, legislatures may not 'please' to be all that openly unreliable; they often prefer to decline the invitation extended in 1819 by Justice Story—the invitation to warn all who would deal with them that their word may well prove worthless. For its own purposes, a government may find it convenient, sometimes indeed imperative, to signal its trustworthiness and thus to induce the sort of reliance that it could instead have spurned. When government makes that choice, a powerful argument may be advanced that the most basic purposes of the impairment clause, as well as notions of fairness that transcend the clause itself, point to a simple constitutional principle: *government must keep its word.*" (Tribe, AMERICAN CONSTITUTIONAL LAW 470 (1978) (emphasis in original)).

Accordingly, San Francisco's unequivocal promises that Appellants' permits would be transferable and irrevocable except for proven cause created both "contract" and "property" rights protected by the Constitution.

This disposes of the *only* defenses tendered by San Francisco. As previously indicated (*see* Jur. Statement at 16), San Francisco does *not* defend Proposition K on the basis that constitutionally sufficient governmental interests justify the impairment of Appellants' permit rights. For reasons developed in the Jurisdictional Statement (at 16-23), such an argument could not plausably be advanced in this case.

The substantiality of the constitutional questions presented is therefore established, and probable jurisdiction should be noted.

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Respectfully submitted,

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